UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

MICHAEL E. THURSTON,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Docket No. 99-40-P-H***
	)	
WILLIAM J. HENDERSON,	***)***	
Postmaster General,	***)***	
	)	
Defendant	***)***	

RECOMMENDED DECISION ON DEFENDANT'S MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

The defendant, William J. Henderson, Postmaster General of the United States Postal Service, sued here in his official capacity, moves to dismiss the complaint in this action alleging employment discrimination based on a mental disability in violation of the Rehabilitation Act of 1973, 29 U.S.C. § 701 *et seq*. In the alternative, he seeks summary judgment. I recommend that the court grant the motion for summary judgment, rendering the motion to dismiss moot.

I. The Motion to Dismiss

A. Applicable Legal Standard

The motion to dismiss invokes Fed. R. Civ. P. 12(b)(6), asserting that the amended complaint fails to state a claim upon which relief may be granted. "When evaluating a motion to dismiss under Rule 12(b)(6), [the court] take[s] the well-pleaded facts as they appear in the complaint, extending

the plaintiff every reasonable inference in [his] favor." *Pihl v. Massachusetts Dep't of Educ.*, 9 F.3d 184, 187 (1st Cir. 1993). The defendant is entitled to dismissal for failure to state a claim only if "it appears to a certainty that the plaintiff would be unable to recover under any set of facts." *Roma Constr. Co. v. aRusso*, 96 F.3d 566, 569 (1st Cir. 1996); *see also Jackson v. Faber*, 834 F. Supp. 471, 473 (D. Me. 1993).

B. Factual Background

The amended complaint alleges that: the plaintiff has been determined by the United States Army to have a 10% permanent disability due to post traumatic stress disorder, subjecting him to anxiety attacks, Amended Complaint (Docket No. 2) ¶¶ 5-8; on his employment application to the United States Postal Service, he stated that he had a medical disability of mental illness, *id*. ¶ 11; he was able to perform his duties in a normal manner after being hired by the Postal Service until March 29, 1996 when incidents he perceived as harassing occurred at the postal facility in Auburn, Maine, where he had been assigned in April 1995, *id*. ¶¶ 12-20, 23-26; he had been able to give up his medication and terminate counseling by April 1995 but had to resume both in April 1996, *id*. ¶¶ 14, 22; one fellow employee repeatedly made remarks about the plaintiff's mental illness, *id*. ¶¶ 23-26; he complained about these remarks to the Postal Service's local Employee Assistance Coordinator and the Auburn postmaster, but nothing was done, *id*. ¶¶ 20, 27-29; he was assigned to the postal facility in Portland from December 1996 to September 22, 1997, *id*. ¶¶ 31-32; the same co-worker on October 14, 1997 made inappropriate remarks about the plaintiff's mental illness in the presence of other co-workers, following which the plaintiff complained to the EAP counselor, a regional supervisor, and the new Auburn postmaster, but nothing was done, *id*. ¶¶ 35-37; on October 23, 1997 the plaintiff contacted the Postal Service's local Equal Employment Opportunity ("EEO") counselor

to request counseling as a result of the incidents, *id*. ¶ 38; on October 30, 1997 the plaintiff learned that the same co-worker had filed a false grievance against him, which caused him to leave work and seek inpatient psychiatric treatment due to emotional distress, following which he was on medical leave due to his psychiatrist's certification that he was unable to work, *id*. ¶¶ 39-43; on November 26, 1997 he went to the Auburn postal facility to pick up his mail and request an extension of his sick leave and was reprimanded by the postmaster for being on the premises and told not to return until further notice, without explanation, *id*. ¶ 45; on December 1, 1997 he received a letter from the Auburn postmaster placing him on administrative leave without explanation, *id*. ¶ 46; after he returned to work in January 1998 other workers shunned him, *id*. ¶ 47, and two co-workers made remarks that the plaintiff believed were directed at his mental disability, *id*. ¶¶ 48-49; on June 18, 1998 he filed a complaint and investigative affidavit alleging disability discrimination with the EEO counselor, *id*. ¶ 60; and on July 7, 1998 he filed a second investigative affidavit with the EEO counselor, *id*. ¶ 61.

C. Discussion

The defendant contends that the complaint should be dismissed because it fails to plead that the plaintiff is a handicapped individual as that term is defined in the Rehabilitation Act of 1973, as amended, and because there is no cause of action for a hostile work environment under the Rehabilitation Act. He also argues that any claims based on certain events are untimely. Defendant's Motion to Dismiss, or in the Alternative, for Summary Judgment, etc. ("Defendant's Motion") (Docket No. 16) at 2. Because the parties have submitted materials outside the pleadings in connection with the latter issue, I will treat the motion with respect to those claims as one for summary judgment, Fed. R. Civ. P. 12(b)(6), and discuss it below, along with the other issues raised

by the defendant's alternative motion for summary judgment.

1. Sufficiency of the pleading.

The defendant concedes that the amended complaint alleges that the plaintiff is a handicapped[1] individual under the Rehabilitation Act. Amended Complaint ¶ 52. However, he argues that the amended complaint is fatally flawed because it fails to allege a factual basis from which it could be determined that the plaintiff is substantially limited in a major life activity, the "first element of proof in any Rehabilitation Act claim." Defendant's Motion at 5 (emphasis in original). The Rehabilitation Act incorporates by reference the standards of the Americans with Disabilities Act ("ADA"). 29 U.S.C. § 791(g); *Tardie v. Rehabilitation Hosp. of Rhode Island*, 168 F.3d 538, 542 (1st Cir. 1999). Under the ADA, "disability" is defined, *inter alia*, as "a physical or mental impairment that substantially limits one or more of the major life activities" of an individual. 42 U.S.C. § 12102(2).

The case law on point for this issue, none of which is cited by the parties, is divided. In *Menkowitz v. Pottstown Mem'l Med. Ctr.*, 154 F.3d 113 (3d Cir. 1998), the court found adequate an allegation in a complaint raising a claim under the Rehabilitation Act that the plaintiff's disability "is a disorder recognized as a disability under" the Rehabilitation Act. *Id*. at 117 n.2. In *Dunlap v. Association of Bay Area Gov'ts*, 996 F. Supp. 962 (N.D.Cal. 1998), the court found adequate to state a claim under the Rehabilitation Act an allegation in the complaint stating that the plaintiff had "permanent physical impairments which substantially limit one or more of his major life activities." *Id*. at 965 (emphasis omitted). On the other hand, the court in *Sacay v. Research Found. of City*

[1] The Rehabilitation Act uses the term "individual with a disability" rather than "handicap." 29 U.S.C. § 794(a).

Univ. of New York, 44 F.Supp.2d 496 (E.D.N.Y. 1999), after thoroughly surveying the existing case law on point, found that a complaint failed to state a claim under the Rehabilitation Act where it alleged that the plaintiff was an individual with disabilities within the meaning of the Act and listed multiple medical conditions from which she suffered, but did not identify any of these ailments as qualifying disabilities under the Act or allege what major life activity was substantially limited by the disabilities. *Id*. at 500-02. *Accord, Adler v. I & M Rail Link, L.L.C.*, 13 F.Supp.2d 912, 937-38 (N.D.Iowa 1998) (also surveying existing case law; ADA claim only).

The plaintiff identifies in his opposing memorandum the major life activities that he contends are substantially limited by his post-traumatic stress disorder as sleeping and the ability to engage in the sexual activity surrounding reproduction. Plaintiff's Memorandum of Law Opposing Motions to Dismiss and for Summary Judgment ("Plaintiff's Memorandum), submitted with Plaintiff's Objection to Defendant's Motion to Dismiss and for Summary Judgment (Docket No. 24), at 6-7. He asks that, if his amended complaint is found to be deficient in this regard, he be allowed to amend it, contending that the defendant will not be prejudiced by such an amendment. *Id*. at 8-10. In reply, the defendant does not argue that the proposed amendment would prejudice him, nor does he suggest that sleeping and sexual relations are not major life activities within the scope of the statute. Rather, he contends that the evidence does not support the claim that the plaintiff's stress disorder has caused impairment in his ability to sleep and engage in sexual relations and, therefore, that the amendment would be futile because the defendant would be entitled to summary judgment. Defendant's Reply to Plaintiff's Objection to Defendant's Motion to Dismiss or for Summary Judgment (Docket No. 29) at 1-2.

As discussed in detail below, I conclude that the defendant is entitled to summary judgment

on the question whether the plaintiff suffered from a disability as defined by the Rehabilitation Act at the time relevant to his claim. Ordinarily, before a Rule 12(b)(6) motion to dismiss is granted, the plaintiff should be allowed a brief period of time within which to further amend his complaint to identify the major life activities that he claims are substantially impaired by his post-traumatic stress disorder. Under the circumstances of this case, the motion to dismiss on this ground will be moot if the court agrees with my recommendation concerning the motion for summary judgment. If the court disagrees with my conclusion concerning that motion, then I recommend that the motion to dismiss be denied conditioned on the plaintiff's amending the complaint within ten days of the court's ruling on the motion to identify the major life activities that he contends are substantially impaired by his post-traumatic stress disorder.

2. Availability of the cause of action.

The defendant characterizes the plaintiff's claim as one for hostile environment discrimination. Defendant's Motion at 4. The plaintiff characterizes his claim as one for harassment, but does not dispute the defendant's recitation of the necessary elements of a claim of hostile environment. Plaintiff's Memorandum at 3. The defendant argues briefly that, because the First Circuit has not held that there is a cause of action for hostile environment discrimination under the Rehabilitation Act, "it is unclear whether Plaintiff may recover on his theory." Defendant's Motion at 4. To the contrary, a federal district court is not constrained to dismiss any claims based on federal causes of action not yet explicitly recognized by the court of appeals for the circuit in which that trial court is located.

As the plaintiff points out, several federal courts have recognized a claim of hostile environment discrimination under the Rehabilitation Act and none, apparently, has rejected it. *E.g.*,

Rothman v. Emory Univ., 123 F.3d 446, 452-53 (7th Cir. 1997); *Pendleton v. Jefferson Local Sch. Dist. Bd. of Educ.*, 958 F.2d 372 (table), 1992 WL 57421 (6th Cir. Mar. 25, 1992), at **6; *Simonetti v. Runyon*, 1999 WL 47144 (D.N.J. Jan. 29, 1999), at *1-*2 and n.1; *Miller v. Cohen*, 52 F.Supp.2d 389, 400 (M.D.Pa. 1998); *Rio v. Runyon*, 972 F. Supp. 1446, 1459 (S.D.Fla. 1997); *Guckenberger v. Boston Univ.*, 957 F. Supp. 306, 314 (D.Mass. 1997). I find the reasoning of these courts persuasive. The defendant offers no reason for this court to depart from this line of authority.

II. Summary Judgment

A. Applicable Legal Standard

Summary judgment is appropriate only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "A fact becomes material when it has the potential to affect the outcome of the suit." *Steinke v. Sungard Fin. Sys., Inc.*, 121 F.3d 763, 768 (1st Cir. 1997). "By like token, 'genuine' means that 'the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party . . . .'" *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995) (citations omitted). The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences in its favor. *Cadle Co. v. Hayes*, 116 F.3d 957, 959 (1st Cir. 1997). Once the moving party has made a preliminary showing that no genuine issue of material fact exists, "the nonmovant

must contradict the showing by pointing to specific facts demonstrating that there is, indeed, a trialworthy issue." *National Amusements, Inc. v. Town of Dedham*, 43 F.3d 731, 735 (1st Cir. 1995) (citing *Celotex*, 477 U.S. at 324); Fed. R. Civ. P. 56(e). "This is especially true in respect to claims or issues on which the nonmovant bears the burden of proof." *International Ass'n of Machinists & Aerospace Workers v. Winship Green Nursing Ctr.*, 103 F.3d 196, 200 (1st Cir. 1996) (citations omitted).

B. Factual Background

The summary judgment record includes the following appropriately supported undisputed material facts.[2] The plaintiff is employed by the Postal Service as a part-time flexible ("PTF") clerk at the Auburn, Maine Post Office. Defendant's Statement of Material Facts Not in Dispute ("Defendant's SMF") (attached to Defendant's Motion to Dismiss, or in the Alternative, for Summary Judgment, etc. ("Defendant's Motion") (Docket No. 16)), ¶ 1; Plaintiff's Response to Defendant's Statement of Material Facts Not in Dispute ("Plaintiff's SMF") (Docket No. 27), ¶ 1. On his employment application dated September 24, 1993 the plaintiff indicated that he had a military service-connected disability of less than 30%. Defendant's SMF ¶ 3; Plaintiff's SMF ¶ 3. After his discharge from the Army, the plaintiff was diagnosed with a service-connected anxiety disorder and assigned at 10% disability rating by the Veterans' Administration.[3] Defendant's SMF

[2] Plaintiff's Memorandum is replete with factual assertions, most of them supported by citations to the plaintiff's affidavit filed with the memorandum, that are not included in his statement of material facts. The court will not consider any facts not included in a statement of material facts in reaching its decision on the motion for summary judgment. Local Rule 56(e).

[3] The former Veterans' Administration is now a cabinet-level agency known as the Department of Veterans' Affairs. I continue to use the former term as it is used throughout by the parties.

¶ 4; Plaintiff's SMF ¶ 4. The plaintiff was first employed by the Postal Service on December 11, 1993 at the Rangeley, Maine post office. Defendant's SMF ¶ 2; Plaintiff's SMF ¶ 2. The plaintiff was able to perform his duties in a normal manner and currently takes medication for his disorder that enables him to work. Defendant's SMF ¶5; Plaintiff's SMF ¶ 5.

The plaintiff was assigned to the Auburn post office in May 1995. Defendant's SMF ¶ 7; Plaintiff's SMF ¶ 7. On March 29, 1996 a co-worker named Paul Lauziere dropped to his knees in front of the plaintiff and said, "Oh great [g]od PTF around here, can you get these newspapers to me at once?" Defendant's SMF ¶ 21; Plaintiff's SMF ¶ 21. Between March 22, 1996 and December 1996 the plaintiff was assigned to work as a temporary supervisor one day or more per week. Defendant's SMF ¶ 8; Plaintiff's SMF ¶ 8. During this period, Lauziere and one or two other co-workers made jokes or bets about when the plaintiff would snap, lose his temper or "crack." Defendant's SMF ¶ 21; Plaintiff's SMF ¶ 21. In December 1996 the plaintiff accepted a temporary detail to a Portland facility as a supervisor and remained there until July 11, 1997 except for approximately four weeks in March and April 1997 when he returned to work in Auburn. Defendant's SMF ¶ 8; Plaintiff's SMF ¶ 8. Robert Balko became postmaster at Auburn on August 24, 1997. Defendant's SMF ¶ 9; Plaintiff's SMF ¶ 9. When the plaintiff returned to work in Auburn, his supervisor told him that he did not know how the plaintiff had been able to take the harassment by Lauziere and others and that it was inappropriate to bring the plaintiff's medical history on to the work room floor. Plaintiff's SMF ¶ 21(1).[4]

On October 14, 1997 Balko was informed by a supervisor that an incident had occurred that

[4] Whenever I cite only to one party's statement of material facts it is in circumstances where the statement is adequately supported by record citation and is uncontroverted. *See* Local Rule 56(e).

morning between the plaintiff and a co-worker, Bill Holden, in which Holden appeared to have been upset by remarks made by the plaintiff. Declaration of Robert Balko ("Balko Decl."), Exh. 1 to Defendant's SMF, ¶ 9. On or about that same day, Lauziere filed a grievance purporting to be submitted on behalf of the plaintiff that made it appear that the plaintiff was seeking a preference in job assignments by claiming seniority rights which he had previously helped to eliminate when he was acting as supervisor. Affidavit of Michael Thurston ("Plaintiff's Aff.") (Docket No. 26) at 7. Balko "brushed off" the plaintiff's attempt to bring this incident to his attention. *Id*. On or about October 15, 1997 Balko assigned another supervisor to investigate what had occurred between the plaintiff, Holden and Lauziere on October 14, 1997. Balko Decl. ¶ 10. She found, *inter alia,* that Lauziere had called the plaintiff "a child," and told him that he was "mentally ill" and "needed help." *Id*. The plaintiff was not given copies of or asked whether he agreed with the statements taken by this supervisor from other witnesses to the incident. Plaintiff's Aff. at 6. On or about October 21, 1997 Balko met with Lauziere and told him that his behavior in the October 14 incident was unacceptable and should not be exhibited in the future. Balko Decl. ¶ 11. Lauziere later sent a letter to the plaintiff expressing his "deepest regret" for the remarks. Letter dated October 28, 1997 from Paul A. Lauziere to Michael Thurston, copy attached to Plaintiff's Aff. The plaintiff was not told about the outcome of the investigation nor given any assurance "that it would[not] happen again." Plaintiff's Aff. at 6.

On February 27, 1998[5] Ray Hamilton, a co-worker, said to the plaintiff in the presence of other workers that the plaintiff was "on suicide watch." Plaintiff's Aff. at 11. On March 19, 1998

[5] The defendant contends that this incident occurred "before December 16, 1997," Balko Decl. ¶ 16, but the difference in dates is immaterial for purposes of the summary judgment motion.

Balko gave Hamilton an "official discussion" about this comment. Defendant's SMF ¶ 22; Plaintiff's SMF ¶ 22. An "official discussion" is a corrective measure short of discipline recognized by the union contract in effect at the Postal Service. *Id*.

On October 23, 1997 the plaintiff contacted the Postal Service's EEO office for the district of Maine with a complaint of disability discrimination. Defendant's SMF ¶ 16; Plaintiff's SMF ¶ 16. On October 30, 1997 the plaintiff left work and admitted himself to the Tri-County Mental Health Center because he feared he would harm Lauziere. Defendant's SMF ¶ 17; Plaintiff's SMF ¶ 17. The plaintiff did not work between October 30, 1997 and January 5, 1998. *Id*. A four-person work environment assessment team, composed of postmasters or managers who did not work in Auburn and did not know the Auburn employees, came to the Auburn postal facility on November 25-27, 1997 and interviewed 24 employees, most of whom worked on the night shift, known as "Tour 1." Defendant's SMF ¶¶ 14, 18; Plaintiff's SMF ¶¶ 14, 18. The team's report to Balko on or about December 1, 1997 included a recommendation that the plaintiff be removed from the Auburn facility for threatening behavior. Balko Decl. ¶ 15. Balko placed the plaintiff on paid leave until December 5, 1997 while he reviewed the statements collected by the team. *Id*. Balko did not explain to the plaintiff why he was placing him on administrative leave. Plaintiff's SMF ¶ 21(5). Balko declined to remove the plaintiff and held a half-hour meeting with Auburn employees on December 16, 1997 during which he told them that he expected employees to treat each other with dignity and respect, that any unprofessional or bad behavior was to cease, and that references to disabilities would not be tolerated. Balko Decl. ¶ 15. When the plaintiff returned to work in January 1998 Balko told him to come to Balko directly with any further problems with co-workers, and the plaintiff did so on a few occasions. Defendant's SMF ¶ 22; Plaintiff's SMF ¶ 22.

When the plaintiff went to the Auburn post office during his medical leave, Balko ordered him to leave and not return and, a few days later, placed the plaintiff on administrative leave, a procedure usually reserved for use as part of a disciplinary process. Plaintiff's SMF ¶ 21(5).

After the plaintiff returned to work in January 1998 two co-workers avoided him at breaks. Defendant's SMF ¶ 21; Plaintiff's SMF ¶ 21. During that same month, Balko stopped the practice of these employees taking breaks at times different from the time when the plaintiff took his break. Defendant's SMF ¶ 22; Plaintiff's SMF ¶ 22. The plaintiff's identification badge was stolen. Defendant's SMF ¶ 21; Plaintiff's SMF ¶ 21. At a meeting, a postal manager suggested that the plaintiff apply for officer-in-charge positions or for a transfer. Defendant's SMF ¶ 21; Plaintiff's SMF ¶ 21. In February 1998 a co-worker named Quentin Curtis said to another co-worker in the plaintiff's presence that he was unable to get out of his chair because he was "too stressed out," a remark which the plaintiff believed was "strictly for my benefit." Plaintiff's Aff. at 10-11.

On February 4, 1998 a supervisor sat and stared at the plaintiff for an extended period of time, asking the plaintiff when he left "Am I stressing you out?" Plaintiff's SMF ¶ 21(4). A co-worker bumped into the plaintiff in February 1998. Defendant's SMF ¶ 22; Plaintiff's SMF ¶ 22. Balko investigated this incident, and when he reported to the plaintiff the co-worker's denial, the plaintiff acknowledged that the contact could have been unintentional. *Id.* The plaintiff believes that he was improperly given a letter of warning at some time in 1998 for falsely reporting that a co-worker had sustained an on-the-job injury, that an incident in which his supervisor upbraided him for leaving early was discriminatory and that his voluntary assignment as officer-in-charge in 1999 to a small post office in Danville, Maine was harassment. Defendant's SMF ¶ 21; Plaintiff's SMF ¶ 21.

The plaintiff has not heard Lauziere make any reference to his disability since January 1998. Defendant's SMF ¶ 23; Plaintiff's SMF ¶ 23. The plaintiff has not experienced problems with his Auburn co-workers since he became a union steward on or about May 2, 1998. *Id*.

On May 16, 1998 the Postal Service issued a final agency decision pursuant to 29 C.F.R. § 1614.105(a)(1) dismissing the plaintiff's claims regarding events that occurred more than 45 days prior to October 23, 1997 as untimely; the plaintiff did not appeal this decision. Defendant's SMF ¶ 20; Plaintiff's SMF ¶ 20.[6]

C. Discussion

The defendant contends that the plaintiff has not produced evidence sufficient to allow a jury to conclude that he is disabled within the meaning of the Rehabilitation Act; that the plaintiff may not recover for allegedly discriminatory acts that took place more than 45 days before his first visit to the EEO counselor on October 23, 1997; that the remaining factual allegations are insufficient to establish a claim for hostile environment discrimination based on the plaintiff's disability; that the defendant's affirmative defense of a reasonable and appropriate response when the plaintiff brought the timely incidents to management's attention has been established by the evidence as a matter of law; and that punitive damages are not available on the plaintiff's claim. Based on the summary judgment record provided by the parties, the first contention is dispositive.

The extensive factual recitation presented above includes nothing concerning the plaintiff's

[6] On January 3, 2000 the plaintiff filed a document entitled "Plaintiff's Response to Defendant's Reply Brief" (Docket No. 31), which includes additional factual assertions, argument and citation to authority. This court's local rules do not provide for the filing of any memoranda or other documents after a reply brief is filed by the moving party. Local Rules 7 & 56. The plaintiff did not seek leave of court to file this "response." Accordingly, I do not consider it in connection with the pending motions.

alleged disability beyond the facts that he has been diagnosed with a service-connected anxiety disorder for which he takes medication and that the Veterans' Administration has given him a disability rating. Under regulations implementing the Rehabilitation Act, an individual with a handicap is defined, *inter alia*, as one who "[h]as a physical or mental impairment which substantially limits one or more of such person's major life activities." 29 C.F.R. § 1614.203(a)(1)(i). "Major life activities means functions, such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 29 C.F.R. § 1616.203(a)(3). "In any claim under the Rehabilitation Act, the plaintiff must first establish that s/he has a disability covered by the Act." *Leary v. Dalton*, 58 F.3d 748, 752 (1st Cir. 1995) (citing 29 C.F.R. § 1614.203).

> To make out a prima facie case of discrimination based on [the identical regulatory definition of a disability under the ADA, a plaintiff] must establish three elements: (1) that he had a "physical or mental impairment" that (2) "substantially limits" (3) "a major life activity."

Soileau v. Guilford of Maine, Inc., 105 F.3d 12, 15 (1st Cir. 1997) (upholding entry of summary judgment for defendant based on plaintiff's failure to produce evidence sufficient to allow reasonable jury to conclude that he was substantially impaired in a major life activity). Standards used to determine whether the Rehabilitation Act has been violated are those applied under Title I of the ADA. 29 U.S.C. § 791(g); *Tardie*, 168 F.3d at 542. Accordingly, in order to avoid the entry of summary judgment for the defendant here, the plaintiff must offer evidence sufficient to allow a reasonable jury to conclude that he was substantially impaired in a major life activity at the time of the alleged discriminatory conduct.

The plaintiff offers no such evidence in his statement of material facts. In this court, "[t]he

parties are bound by their Rule 19 [now Local Rule 56] Statements of Fact and cannot challenge the court's summary judgment decision based on facts not properly presented therein." *Pew v. Scopino*, 161 F.R.D. 1, 1 (D. Me. 1995). While the plaintiff discusses in his memorandum of law and affidavit possible evidence of one or more major life activities that he contends were substantially impaired by his stress disorder at the relevant time, none of that evidence is mentioned in his statement of material facts. As a result, I must conclude that his summary judgment submission has failed to establish the existence of a disputed issue of material fact with respect to an essential element of his claim and that summary judgment for the defendant is therefore in order.

III. Conclusion

For the foregoing reasons, I recommend that the defendant's motion for summary judgment be **GRANTED**. If the court agrees with my recommendation, the defendant's motion to dismiss is moot. If the court should disagree and deny the motion for summary judgment, I recommend that the defendant's motion to dismiss be **DENIED** on the condition that the plaintiff promptly submit a second amended complaint adding specific allegations identifying the major life activities alleged to have been substantially impaired by the plaintiff's disability at the relevant time.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review

by the district court and to appeal the district court's order.

Dated this 5th day of January, 2000.

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David M. Cohen
United States Magistrate Judge